(2)

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 97-749

In The

Supreme Court of the United States

October Term, 1997

BARRY K. SCHWARTZ PARTNERSHIP, ZENYA YOSHIDA, EARL H. SCHULTZ AND KENNETH FRANZHEIM II,

Petitioners,

vs.

ROGER SULLIVAN, Executor of the Estate of Frank Bryant, Deceased,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS K. BOURKE
Counsel of Record
601 West Fifth Street
One Bunker Hill Building,
8th Floor
Los Angeles, California 90071-2094
(213) 623-1092
Attorney for Respondent
Roger Sullivan, Executor of the Estate of Frank Bryant, Deceased

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3388

QUESTIONS PRESENTED

1. Is there a rational basis for the Ninth Circuit's direction to the trial court to assess attorney's fees against these multimillionaire petitioners under § 11(e) of the Securities Act of 1933, 15 U.S.C. § 77k(e), on the grounds that petitioners' claims were "without merit," in suing Frank Bryant under the Securities Act when they sued him for over $9 million even though they never communicated with him in any way, oral, or written, before their stock purchases, where the Ninth Circuit had five years earlier upheld the trial court's determination that none of petitioners' claims met the test for complete frivolousness in deciding whether to sanction petitioners and their counsel under Rule 11 of the Federal Rule of Civil Procedure?

2. Should there be a uniform standard for awards of attorneys' fees under § 11(e) of the 1933 Act so that those wrongfully sued can be assured of recovering attorneys' fees whenever the Securities Act claims brought against them are without merit?

LIST OF PARTIES

The petition does not acknowledge that fashion designer Calvin Klein was a named plaintiff in the original case and an appellant or respondent in all the subsequent appeals. The Ninth Circuit's Memorandum Decision of May 14, 1997 referred to the Respondents as "Calvin Klein and his partner Barry K. Schwartz d.b.a. Barry K. Schwartz Partnership, Kenneth Franzheim II, Zenya Yoshida d.b.a. Shadai Farms, Earl H. Shultz, Robert D. Stratmore, and Richard D. Schultz (collectively the 'Klein appellees.' " App. A, at page 49.

Robert L. Stern, et al., *Supreme Court Practice* § 6.20 (7th ed. 1993), criticizes what the Klein petitioners have done here:

> A petitioner sometimes fails, either intentionally or accidentally, to name a party who was involved in the proceedings below and who still retains an interest in the case. Such an omission is totally unjustified under the rules and is unfair to the unnamed party. Rule 12.4 accordingly provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition."

Because there is no express notification that Calvin Klein has no interest in the outcome of the petition, we assume that Calvin Klein is a petitioner, even though his name does not appear on the caption of the petition.

LIST OF PARTIES – Continued

Similarly, the four known heirs of Zenya Yoshida, i.e. Kazuko Yoshida, Katsumi Yoshida, Teruya Yoshida, and Haruya Yoshida, are all represented by Mr. Bettinger and Orrick, Herrington & Sutcliffe LLP, who should have, but have not, substituted the four heirs in as the real parties in interest and named them in the caption in place of Zenya Yoshida, deceased.

Other parties below included Dr. John and Virginia McGonigle, H. James Griggs, Blas Casares, Richard D. Schultz, Bateman Eichler, Hill Richards, Inc., Robert McGuiness, Charles R. Hembree, and Kincaid, Wilson, Schaeffer & Hembree, P.S.C. These parties have no interest in the outcome of this petition.

Roger Sullivan, the executor of the Estate of Frank Bryant, has now obtained an order closing the estate and distributing its assets to a Revocable Trust Mr. Bryant set up in 1993 before he died. Mr. Sullivan has resigned as trustee of the Revocable Trust and been replaced by two of Mr. Bryant's eight children: Patricia Bryant and Rolla McFall Bryant. The other heirs of Mr. Bryant's estate were Francis Patrick Bryant, Kim Hillary Bryant, Maureen Bryant Call, Ellen Bryant Archibald, Sharon Bryant, and Sister Kathleen Bryant, I.S.C., and two Catholic charities, Loyola High School of Los Angeles, and the Sister Kathleen Mission Foundation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

JURISDICTION 1

PRAYER 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

A. Facts of the case 2

B. Corrections of misstatements in the petition .. 8

REASONS FOR DENYING THE PETITION 14

I. Petitioners failed to raise their arguments below 14

II. Petitioners are challenging an interlocutory decision 15

III. Petitioners' real quarrel is with the unappealed decision entered five years ago 15

IV. The question presented in this case is unique since in the thousands of Securities Act cases, no court has dealt with a similar case inconsistently 16

V. The Circuit Court rationally decided that the petitioners' claims were without merit since they never communicated with Frank Bryant 17

TABLE OF CONTENTS – Continued

Page

VI. This Court will not want to be dragged into the factual morass represented by the 14 volumes of Excerpts of Record 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Johnson v. Yerger, 612 F.2d 953 (5th Cir. 1980).....14, 16

Junker v. Crory, 650 F.2d 1349 (5th Cir. 1981) 14, 16

Layman v. Combs, 994 F.2d 1344 (9th Cir. 1992), *cert. denied sub nom., Bryant v. Klein*, 510 U.S. 914 (1993) 1, 2, 5, 12, 15, 18

Pinter v. Dahl, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988).....8, 10

Rucker v. La-Co, Inc., 496 F.2d 850 (8th Cir. 1974).... 14, 16

Schultz v. Hembree, 975 F.2d 572 (9th Cir. 1992)..... 3

SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980) 10

SEC v. Seaboard Corp., 677 F.2d 1289 (9th Cir. 1982) 10

Thigpen v. Roberts, 468 U.S. 27, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984)..... 9

United States v. Rapp, 871 F.2d 957 (11th Cir. 1989) 7

Washington v. Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 493 (1979)..... 9

Zissu v. Bear Stearns & Co., 805 F.2d 74 (2d Cir. 1986)..... 16

STATUTES

28 U.S.C. § 1254(1) 1

Florida Blue Sky statute, Fla. Stat. Ann. §§ 517.211 et seq. 6

Ohio RICO statute, Ohio Rev. Code §§ 2923.31-2923.36 (Anderson 1994) 6

TABLE OF AUTHORITIES – Continued

Page

Section 11(e) of the Securities Act of 1933, 15 U.S.C. § 77k(e) ..... *passim*

Section 12 of the Securities Act of 1933, 15 U.S.C. § 77*l* ..... *passim*

RULES

Fed. R. Civ. P., Rule 11 5

Rule 15(2) of the Rules of the Supreme Court 8

TREATISES

Robert L. Stern, et al., *Supreme Court Practice* (7th ed. 1993) 17

JURISDICTION

The petition purports to relate to the unpublished, interlocutory judgment of the Ninth Circuit entered on May 14, 1997, that remands the case to the district court for further proceedings. App. A, page 1a. Petitioners' motion for rehearing was denied on August 1, 1997. App. G, pages 74a-75a. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Respondent suggests that the questions presented and the petition reveal that the petitioners are actually attacking the prior published decision of the Ninth Circuit in *Layman v. Combs*, 994 F.2d 1344 (9th Cir. 1992), *cert. denied sub nom., Bryant v. Klein*, 510 U.S. 914 (1993), App. D, at pages 18a-45a, and that the petition is untimely for that reason.

Respondent is aware of precedent holding that an interlocutory decision of the Court of Appeal may still be reviewed later by this Court after a final judgment, but there is not yet any final judgment in this case. The district court is proceeding to implement the mandate of the Ninth Circuit's May 17, 1997 decision, but has not rendered any decision on remand.

PRAYER

Respondent Roger Sullivan, and the real parties in interest, Patricia Bryant and Rolla McFall Bryant, trustees of the Frank Bryant Revocable Trust of 1993, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the unpublished, interlocutory decision of the Ninth Circuit dated May 14, 1997, printed in App. A, page 1a.

While not purporting to be such, the petition is actually an untimely appeal from the reported decision of the Ninth Circuit, *Layman v. Combs*, 994 F.2d 1344 (9th Cir. 1992), *cert. denied sub nom., Bryant v. Klein*, 510 U.S. 914 (1993), printed in App. D, pages 18a-45a.

STATUTORY PROVISIONS INVOLVED

This Case involves Sections 11(e) and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k(e) & 77*l*. Section 12 is reprinted in Appendix H, page 76a. Section 11(e) provides in relevant part:

> In any [Securities Act] suit . . . the court may, . . . if the court believes the suit or the defense to have been **without merit,** [assess legal fees and other costs] in an amount sufficient to reimburse him for the reasonable expenses incurred by him. . . .

(Emphasis added.)

STATEMENT

A. Facts of the case.

In August 1983 the crème of the American "horsy" set decided to invest in Spendthrift Farm, Inc., the IBM of the thoroughbred race horse industry in Lexington, Kentucky. The horsemen, some of whom had played the horses since childhood, included Calvin Klein, the noted fashion designer, his life-long friend, Barry Schwartz, Kenneth Franzheim, the former ambassador and owner of

another Kentucky thoroughbred race horse farm called Xalpa Farm, Zenya Yoshida, the largest thoroughbred race horse owner in Japan, and other luminaries, all of whom had net worths over $5 million.

Calvin Klein and Barry Schwartz, for example, invested $1.75 million of their considerable fortunes. So did Ambassador Franzheim and Zenya Yoshida. Dr. Earl Shultz invested $500,000. Their investments turned sour a few years later when the value of horses dropped. So what did they do? Sue. Who did they sue? Everybody in sight.

The six petitioners are a subset of the 34 private placement investors in Spendthrift Farm. Not all of the investors sued. The former head of Merrill Lynch did not sue. The former head of American Express did not sue. But many of the multimillionaire investors hired a big California law firm, Pillsbury Madison & Sutro, which launched "shotgun litigation"[1] in the hopes of wounding someone.

---

[1] Judge Alex Kozinski defined the term "shotgun litigation" in describing the Klein Plaintiffs' action in one of the related published opinions about this case. *Schultz v. Hembree*, 975 F.2d 572, 576 (9th Cir. 1992):

> We live in a society which, unfortunately, sanctions the view that litigation is a proper response to many of life's hard knocks. Lawyers capitalizing on this phenomenon often multiply unnecessarily the number of legal theories under which suit is brought. *The result in many cases is shotgun litigation: a barrage of claims, emanating from a point source and fanning out in the hopes of wounding someone in the process.*

(Emphasis added.)

The investors who sued all lost. They lost on everly claim against every defendant. They lost against the two sellers of the stock, Leslie and Brownell Combs, the sellers' financial advisor, Garth Guy, the sellers' lawyers, the horse appraiser, the farm's accountants, the farm's commercial bank, the farm's investment banking firm, and the people who recommended the sellers' stock on the golf course. All were sued, all were vindicated.

The petitioners are a very special subset of the investors. First, they are among the few plaintiffs who sued Frank Bryant, a Los Angeles accountant who did not know which end of a horse bit and which one kicked. Excerpts of Record, Tab 9:Ex. L. Most of the private placement investors and the later class action public offering investors chose not to sue Mr. Bryant. Mr. Bryant was brought on the scene *after* petitioners committed to make their investments. The six petitioners are even a subset of those few investors who sued Mr. Bryant, since on the second appeal Mr. Bryant appealed the failure to award him § 11(e) fees only against those plaintiffs who had never communicated with him. He never spoke to them, never sent them a single letter.

Despite his lack of involvement, which he brought quickly to petitioners' attention, petitioners sued him for violation of Section 12 of the Securities Act of 1933. That Act allows suit against any person who "**offers or sells a security . . . by means of a prospectus or oral communications,** which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements . . . not misleading. . . . " (Emphasis added.)

Petitioners brought their suits in 1986 and they survived Bryant's motions to dismiss by falsely alleging that he prepared and helped conceal from the petitioners a private placement memorandum supplement. By 1988 Bryant had proved, citing chapter and verse of the extensive record, that those allegations were false and the district court granted summary judgment.

In 1989 Bryant applied for attorneys' fees under Fed. R. Civ. P., Rule 11, Section 11(e) of the Securities Act of 1933, and other grounds, against all the plaintiffs and their counsel. The district court remarked "[T]his case probably stands as bad an example as any of where the present system we have has resulted in tremendous expense and great hardship, I am sure for a lot of people. And if we need a case to cite to the legislature for changing the rule on who gets attorneys' fees, I suppose this would be about as good a one as any to present to them." App. E, at page 50a.

Bryant brought a timely appeal to the Ninth Circuit, pointing out that Congress, i.e., the federal legislature, had already changed the rule for awarding legal fees in Securities Act cases, by allowing fee shifting under § 11(e) for cases found to be "without merit."

As the petition admits at page 3, the 1992 decision of the Ninth Circuit in *Layman v. Combs*, 994 F.2d at 1353, n. 7, App. D, page 31a, n. 7, simultaneously affirmed the denial of fees under Rule 11 and remanded to the district court after finding the proper standard for awarding § 11(e) fees was "border on the frivolous," in contrast to the totally frivolous standard of Rule 11. Petitioners did not then petition this Court for review. Instead, they waited five years to criticize the 1992 ruling.

In the 1992 ruling, Judge Alex Kozinski and the other two panelists, Judges Canby and Carroll, unanimously reversed and remanded as to § 11(e) fees for Bryant. Judge Kozinski lamented the fact that the litigation "devoured a staggering quantity of productive resources. The record consists of 50 cubic feet of paper and weights over half a ton. There were 4,500 entries in the docket sheets below, including almost 400 orders and ruling by the district court. Fifty-seven briefs, consisting of nearly 1,800 pages were filed on appeal, yielding three published opinions." App. D, at page 43a.

Judge Kozinski termed the litigation a "conflagration," "scorched earth litigation – the juridical equivalent of the firebombing of Dresden," and "kamikaze litigation." Lest there by any mistake as to his sympathies, Judge Kozinski, in footnote 3 wrote that "The case of Frank Bryant, a Spendthrift consultant, is particularly alarming. His defense was that he joined Spendthrift after the sale of the shares and was not in any way involved in the conception or drafting of the PPM. . . . Defending on this theory, and winning summary judgment, Bryant was nonetheless saddled with approximately $900,000 in legal fees. . . . If this is the face of victory, how much uglier could defeat be?" App. D at page 44a, n. 3.

On remand, after reviewing five feet of paper, the district court awarded Bryant over $1 million in fees against plaintiff Richard Schultz for his bordering on the frivolous Ohio RICO claims under Ohio's fee-shifing statute. He also awarded fees against plaintiff Blas Casares under the Florida Blue Sky fee-shifting statute. Unfortunately for the Bryant heirs, Richard Schultz divested himself of his $20 million net worth through fraudulent transfers the month before the Bryant judgment was

entered, including agreeing to a collusive judgment with his father that was orchestrated by Tampa lawyer Domenic Massari,[2] that transferred $5.5 million of exposed assets to Richard Shultz's father.[3]

When the district court again refused to award fees under § 11(e), Bryant took another appeal. This time the record included 14 Volumes of Excerpts of Record, amounting to 4,299 pages, which together with the 13 Volumes of Excerpts of Record amounting to 4,005 pages in the companion appeal of the Schultz judgment, totaled 27 Volumes of Excerpts of Record and 8,304 pages. On

---

[2] Schultz's attorney Domenic Massari was indicted but not convicted in a bank fraud in which the Eleventh Circuit criticized his role: *United States v. Rapp*, 871 F.2d 957, 960 (11th Cir. 1989) ("the more difficult task, however, was securing a favorable opinion letter on the legality of the transactions. Initially, Rapp, Smith and Bodziak, through Bodziak's attorney, Dominic [sic] Massari, hired Palmer Hamilton . . . to author a favorble letter. . . . A large fee was promised . . . Hamilton pointed that the loan would be an unsafe and unsound banking practice. Rapp and Bodziak were displeased. Eventually, however, they obtained a favorable opinion from a Miami lawyer.").

[3] In the collusive lawsuit Schultz's father chose to retain Warren Wilson, III, a former fraternity brother of Massari who had served as a name partner in Massari, Wilson & Dreyer. Schultz's collusive lawsuit came to a quick and happy ending for father and son, shielding $5.5 million of exposed Richard Schultz assets from the Bryant heirs, just days before entry of the Bryant Estate's judgment. In the month before the Bryant Estate judgment Schultz also laundered $3 million to Cayman Islands accounts controlled by his brother. Despite claiming to be broke, Schultz continues to be represented by major law firms around the country and his counterattack against the Bryant Estate and its attorneys with harassing litigation. Schultz has since been found in contempt of court for discovery abuse, but has not made significant payments to the Bryant Estate.

this appeal as to § 11(e), Bryant took a scalpel to his claims and appealed only as to the plaintiffs who never communicated with him. He did not appeal as to plaintiffs who even claimed to have communicated with him before investing.

On the second and trimmed down appeal against the Klein plaintiffs, the Ninth Circuit, with a panel of Judges Choy, O'Scannlain, and Leavy, reversed the district court's denial of attorneys' fees to Bryant under § 11(e), holding that under the law before *and* after *Pinter v. Dahl*, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988),

> Bryant was clearly not a seller for purposes of § 12. Bryant never spoke to any of the Klein appellees before they invested; nor did he draft the private placement memorandum or its supplement. He had no effect on their investment decisions. It is thus impossible to argue that he was "both necessary and a substantial factor in the sales transaction," or that he 'successfully solicited' the purchases in any way. The § 12 claims against Bryant bordered on the frivolous. . . .

May 14, 1997 Memorandum Opinion, App. A, at pages 6a, 7a. The panel remanded to the district court to "issue an appropriate award of attorneys' fees." The panel ordered the decision to remain unpublished.

B. Corrections of misstatements in the petition.

Rule 15(2) of the Rules of the Supreme Court provides in pertinent part that:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of

> fact or law in the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatements made in the petition.

Aside from the failure to acknowledge that Calvin Klein is a petitioner, at least 12 misstatements of fact in the petition exaggerate the role of Frank Bryant in the private placement. As the petitioners have done for the past 11 years, they exaggerate his role, and this is material since this Court is likely to find that the petitioners' claims against him bordered on the frivolous, and indeed were totally frivolous.[4]

The first such misstatement is on page 4 of the petition where the Klein petitioners state that on the second appeal, "Bryant appealed again, limiting this appeal to just the petitioners and two other plaintiffs where had not been among the potential investors to whom Bryant had directly promoted the stock." The record reflects Mr.

---

[4] A cross petition is not necessary to enable to prevailing party to "defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.20, 99 S.Ct. 740, 58 L.Ed.2d 493 (1979), so long as it does not change the judgment. *Thigpen v. Roberts*, 468 U.S. 27, 29, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984) ("[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted below."). Here the decision can be defended on the ground the petitioners' claims were completely frivolous, which they were.

Bryant's declaration that he did not promote the private placement to any one (ER 1706-1847),[5] and no petitioner submitted any declaration contradicting that statement. To be specific, Mr. Bryant swore "I did not sell any stock to plaintiffs. I did not persuade them to purchase or attempt to persuade them to purchase. I did not give them the PPM. I did not give them the PPM supplement. In short, I did not solicit their purchases." (ER 1714.)

The second misstatement is again on page 4 of the petition, where the Klein petitioners state that "Prior to *Pinter*, courts had not defined uniformly the term 'seller.' " In fact, under the pre-*Pinter* "substantial participation" concept, the courts had clearly announced a causation-in-fact standard. As the Memorandum Opinion stated at page 6a, "Under the pre-*Pinter* standard for 'seller,' 'the test is whether the injury to the plaintiff flowed directly and proximately from the actions of the defendant.' *SEC v. Seaboard Corp.*, 677 F.2d 1289, 1294 (9th Cir. 1982). A defendant's actions must be 'both necessary to and a substantial factor in the sales transaction.' *SEC v. Murphy*, 626 F.2d 633, 650 (9th Cir. 1980)." App. A, at page 6a.

The thrid misstatement is on page 6 of the petition, where the Klein petitioners state that Bryant "deliberately interjected himself in the private placement," with no citation to the record.

The fourth misstatement is the next statement on page 6 of the petition that "Bryant understood that the private placement was an integral part of the financial

---

[5] As in the petition, ER refers to the page in the 14 volumes of joint excerpts of record below.

plan for Spendthrift." It cites to ER 3660, 3671. Neither citation supports the statement. ER 3660 refers to the plans of Mr. Guy, not Mr. Bryant, and ER 3671 is a deposition excerpt that refers to the *public* offering, not the private placement, being an integral part of the financial plan for the farm. See Respondent's Appendix at page 3, attached hereto, for page 125 of the Bryant deposition, the page before page 126, which is ER 3671.

The fifth misstatement is the statement on page 6 of the petition that "A successful private placement giving Spendthrift a roster of wealthy horsemen as investors was viewed as helping make the public offering more attractive. ER 486-89, 3659." The citations do not support the statement. Rather, ER 486-89 is a list of directors, and ER 3659 merely shows that a Mr. Guy was trying to prepare the company to go public by hiring the proper people, including hiring Mr. Bryant to work on the public offering. ER 3656-3657.

The sixth misstatement is the last sentence on page 6 of the petition that "The forthcoming public offering was likewise to be an inducement to potential private placement investors for whom the public offering would provide a market for any stock purchased. ER 290, 411-12." In fact, the citations to the record merely include the PPM's disclosure that private placement investors would have the right to require Spendthrift to go public after two years, ER 290, and the PPM Supplement's disclosure that Spendthrift was "currently considering the possibility of selling shares" in an initial public offering, and that "no assurance can be given . . . that such public offering will take place." The petition omits to tell this Court that the petitioners' complaints alleged they never saw the PPM Supplement until *after* they had invested.

The seventh misstatement, on page 7 of the petition, is that "Bryant hired and directed the lawyers. ER 3718, 3760." In the first place, ER 3718 states that Bryant "has recommended to Spendthrift" that *it* hire Gibson, Dunn & Crutcher. In the second place, ER 3760 does not refer to Frank Bryant at all. It is a Gibson, Dunn & Crutcher lawyer testifying that his senior partner Frank Wheat, a former SEC Commissioner, asked whether he could work on the public offering. In the third place, the statement that Bryant hired and directed "the lawyers" is misleading as it imples he hired and directed the Kentucky lawyers who did the private placement, drafted the PPM, and were sued. Mr. Bryant did not hire or direct them.

The eighth misstatement, also on page 7 of the petition, is that "Bryant met with the lawyers and investment bankers and considered with them whether the private placement complied with the securities laws. ER 3774-82." The citation to the record is to illegible notes that are incomprehensible, at least without explanation from their author. The footnote 4 in the petition merely makes further one-sided attempts to interpret the illegible notes.

The ninth and most egregious misstatement is that on page 7 of the petition that "Bryant himself contacted potential investors (including plaintiffs in *Layman v. Combs,* but not these particular petitioners) to promote the private placement of Spendthrift stock. ER Supp. 27, 47; CR 949)." In fact ER Supp. 27, 47 relate to a July 1983 conversation and a July 1983 letter from Mr. Bryant to Joe Layman, long *after* Mr. Layman had committed in May 1983 to invest in the private placement. ER 56, 1719-1722.

The tenth misstatement is that on page 8 of the petition that "Bryant directed that the lawyers 'review and approve' the private placement arrangements before the $35 million private placement closed. ER 3718." Again this is a significantly misleading statement since Mr. Bryant was a financial consultant to Spendthrift Farm, not a vice-president, secretary, or treasurer. He recommended to Spendthrift that it hire Gibson, Dunn & Crutcher do the designated task. ER 3718. He did not "direct" them, nor did he direct the Kentucky lawyers for the Sellers, nor did he direct the Latham & Watkins attorneys (lawyers for the farm's investment banker) who assisted the farm in preparing for the public offering that followed the private placement to these petitioners.

The eleventh misstatement is that on page 8 of the petition that "Bryant's report was reflected in a supplemental disclosure to the private placement investors. ER 409." There is no testimony in the record supporting that statement. The PPM Supplement disclosure relating to the Arnold Kirkpatrick drug arrest was prepared by Garth Guy, assisted by Kentucky lawyers and Gibson, Dunn & Crutcher and Latham & Watkins. Mr. Bryant was 3,000 miles away at the Pritikin Health Center in Santa Monica seeking to reform his health. ER 1711-1714. Again, the Klein petitioners alleged in their complaints that they did not get the supplement until after they invested.

The twelfth misstatement is that on page 8 of the petition that "Bryant was kept fully aware of these developments and of the lawyers' inability or refusal to 'approve' the private placement. ER 3764-65, 3784-86, 3796." All ER 3764-65 states is that a Gibson Dunn lawyer

called Mr. Bryant from Kentucky for the purpose of keeping him up to speed generally and indicating to him what had transpired during the trip to Lexington. The lawyer did not testify to any specifics. ER 3784-86 is an internal Gibson Dunn memorandum never sent to Mr. Bryant. ER 3796 is another Gibson Dunn memorandum relating a call to Mr. Bryant at the Pritikin Longevity Center in Santa Monica to "bring him up to date." Again no specifies of this phone call are in the record.

In short, the petition brims with misstatements as to the record. It is this sort of behavior that made Mr. Bryant's defense of the case difficult. The Klein petitioners and their attorneys were willing to misrepresent and twist the facts to stay in court, as by their false allegation that Mr. Bryant drafted and concealed the PPM Supplement. ER 3209-3212.

REASONS FOR DENYING THE PETITION

I. Petitioners failed to raise their arguments below.

The petitioners failed to raise their arguments below, either to the district court or the Circuit Court. They never cited below the cases the petition cites in footnote 7 at page 10, *Johnson v. Yerger*, 612 F.2d 953, 959,-960 (5th Cir. 1980), *Junker v. Crory*, 650 F.2d 1349, 1364-1365 (5th Cir. 1981), or *Rucker v. La-Co, Inc.*, 496 F.2d 850, 853 (8th Cir. 1974), for the proposition that the proper standard is frivolous. They never suggested that the proper standard was anything other than border on the frivolous.

Nor have they ever argued before this petition that the "border on the frivolous" standard is difficult to rationally apply. Their approach below was always to say that their claim against Bryant was proper.

II. Petitioners are challenging an interlocutory decision.

Petitioners are challenging a non-final, interlocutory decision that expressly remands the case to the district court for further proceedings.

III. Petitioners' real quarrel is with the unappealed decision entered five years ago.

Petitioners' real quarrel is with the five year old decision of the Ninth Circuit in *Layman v. Combs*, 994 F.2d 1344 (9th Cir. 1992), *cert. denied sub nom., Bryant v. Klein*, 510 U.S. 914 (1993). The petition makes clear at page 3 that it was this five year old decision, not the May 14, 1997 Memorandum Decision that "held that in the Ninth Circuit the 'without merit' standard for an assessment of fees under § 11(c) is not whether the claims are 'frivolous' but whether they 'border on the frivolous' and remanded to the trial court to determine if plaintiffs' '33 Act claims 'bordered on the frivolous.' "

That five year old decision may be reviewable after a final judgment, but not on review of another interlocutory decision.

IV. The question presented by this case is unique since in the thousands of Securities Act cases, no court has dealt with a similar case inconsistently.

The question presented by this case appears unique. Sometimes cases are totally frivolous, and they are by definition cases that border on the frivolous. For example, *Zissu v. Bear Stearns & Co.*, 805 F.2d 74, 80 (2d Cir. 1986) (upholding § 11(e) claims against a sophisticated New York investor-lawyer who brought frivolous Securities act claims).

Rarely, if ever, however have the courts ruled that a case was good enough not to be frivolous, but fell close enough to border on the frivolous. Petitioners have not cited any and Respondent's attorney is unaware of any save this one. This is not a burning issue of securities law, arising as it does once every 63 years.

The cases the petition cites in footnote 7 at page 10, *Johnson v. Yerger*, 612 F.2d 953, 959,-960 (5th Cir. 1980), *Junker v. Crory*, 650 F.2d 1349, 1364-1365 (5th Cir. 1981), or *Rucker v. La-Co, Inc.*, 496 F.2d 850, 853 (8th Cir. 1974), for the proposition that the proper standard is frivolous, are distinguishable. *Johnson* and *Junker* both used the statutory language itself "without merit" in addition to "frivolous" in describing the correct standard under § 11(e), 612 F.2d at 959, and 650 F.2d at 1364. *Rucker* merely awarded fees for a claim "without merit" and denied fees for a claim that was not frivolous, 496 F.2d at 853, but *Rucker* did not face the issue of "border on the frivolous" was a test for without merit under § 11(e).

The Supreme Court does not ordinarily regard Circuit Courts as splitting on an issue when some of the

lower court decisions are distinguishable or do not squarely raise the issue. Robert L. Stern, op. cit., § 6.31, at 355.

V. The Circuit Court rationally decided that the petitioners' claims were "without merit" since they never communicated with Frank Bryant.

The Ninth Circuit, and all six of its judges who have looked at the case, have twice felt that the Klein petitioners' Securities Act claims against Mr. Bryant were without merit. The standard they used is "bordered on the frivolous."

Their decisions are hardly irrational, since petitioners sued Mr. Bryant, with whom they had never communicated, under a statute that found persons liable only if they made misstatements of material fact or omitted to state material facts in the course of selling securities by means of oral statements or a written prospectus. Moreover, the plain meaning of "without merit" might even allow § 11(e) fees for less than cases "bordering on the frivolous" as the plain meaning of without merit is – a case that loses.

The Klein petitioners' main problems in suing Mr. Bryant were (1) he did not sell them anything, (2) he made no oral statements at all to them, and (3) he did not participate in drafting the prospectus.[6]

---

[6] The prospectus in this case was called a private placement memorandum and it was supplemented by a private placement supplement.

All Mr. Bryant did was hire Gibson, Dunn & Crutcher and former SEC Commissioner Frank Wheat and tell them to do a good job on the subsequent *public* offering. They did. Mr. Bryant's reward for doing so was to be labeled a racketeer and accused of being a stock fraud by the Klein petitioners in their $9 million Securities Act suits based on the earlier *private* offering.

Judge Kozinski commented about this case that:

> That the plaintiffs were able to inflict major financial damage on their adversaries, using as their launch vehicle a case so thin it was never allowed to reach the jury, will surely send a chill down the spine of anyone contemplating selling securities – or engaging in any other type of business – in our litigation-minded society.

Layman v. Combs, supra, App. A, at page 44a.

He also remarked on the sophisitication of the multi-millionaire petitioners:

> These weren't mom and pop investors who mortgaged their retirement to buy palladium mines in Zanzibar. . . . These were seasoned business people who commanded considerable resources. Many of them had substantial experience with horse breeding; some had already been doing business with Spendthrift. Most retained independent investment advisors and lawyers, and took their sweet time buying into the deal. They risked what they warranted were disposable resources, hoping to get even richer. They gambled – and they lost.

Id., at page 40a.

The lawsuit too was a gamble, in which they hoped to recover $9 million plus their legal fees and interest, and lost. Mr. Bryant's estate asks only that he recover his attorneys' fees and interest on those fees incurred over the past 11 years of endless litigation, now that their Securities Act cases have been found to be without merit.

VI. This Court will not want to be dragged into the factual morass represented by the 14 volumes of Excerpts of Record.

Mr. Bryant and his estate have been correcting the misstatements of fact in this case for eleven years. First during two rounds of motions to dismiss, then at summary judgment, then at the first fee applications state, then at the first appeal, then on the first remand and the second fee application stage, then on the second appeal, where many of the same 12 misstatements being made in the petition were refuted in the reply brief, and now responding to this petition for certiorari.

This Court will hesitate to get dragged into a messy factual dispute about the degree of frivolousness of six different plaintiffs in the course of an 11 year litigation with an 8,304 page record. This Court has warned about the dangers of fee litigation turning into a second major litigation, and granting certiorari would only breathe new life into this satellite litigation.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this Court should deny the writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

THOMAS K. BOURKE
Counsel of Record
Attorney for Respondent
Roger Sullivan,
Executor of the Estate
of Frank Bryant,
Deceased
601 West Sixth Street
One Bunker Hill Building
8th Floor
Los Angeles, California 90071-2094
(213) 623-1092

APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GEORGE D. LAYMAN, et al., Plaintiffs, vs. BROWNELL COMBS II, et al, Defendants.	Case No. C-86-1692 CAL (Layman) Case No. C-86-3474 CAL (Griggs) Case No. C-86-3673 CAL (Yoshida) Case No. C-86-0379 CAL (Stratmore) C-86-4129 CAL (McGonigle) Case No. C-87-1129 CAL (Casares) VOLUME i

(SEE NEXT PAGE FOR COMPLETE CAPTION)

DEPOSITION OF FRANK L. BRYANT

Los Angeles, California

November 2, 1987

REPORTED BY

Lisa Trani

CSR #6039

COLEMAN, HAAS, MARTIN & SCHWAB, INC.

Certified Shorthand Reporters

2140 WEST OLYMPIC BOULEVARD,

SUITE 201

LOS ANGELES, CALIFORNIA 90006

TELEPHONE (213) 480-1234

* * *

Spendthrift for two or three days, was there any discussion about the private placement at that meeting? Is it fair to characterize that as a meeting or a visit?

A. I'd call it a visit.

Q. Any discussion about the private placement at that visit?

A. No, other than perhaps an update. I don't recall any.

Q. Did you know if the private placement had closed at that point?

A. No.

Q. Were you ever offered stock in the private placement?

A. I don't know whether eventually when we came down to terms on my consulting agreement whether they offered it to me or I requested it in lieu of the option arrangement.

Q. Do you recall when that was, when this offer took place?

A. It would have been just immediately prior to the time that I agreed to join them as a consultant. Probably in mid-July, early July.

Q. So just so we can place this on a time line, is that before or after this meeting where you went back with your wife to Spendthrift?

[p. 125]

A. It was after that meeting.

Q. And during this – let's call it meeting or visit with your wife back at Spendthrift – was there any discussion about the public offering?

A. Yes.

Q. Do you recall what was said on that subject?

A. Mostly questions by Brownell as to how it would take place and what would happen and what would be the program, how it worked.

Q. Did he ask these questions of you?

A. Yes.

Q. Was Mr. McGuinness back at Spendthrift during this visit?

A. No.

Q. Was anyone else present during this conversation you had with Brownell?

A. Possibly Garth Guy.

Q. Did Garth have any comments concerning the public offering?

A. I think "comments" is pretty broad. I don't know what you mean.

Q. Did you have any discussions with Mr. Guy about the public offering?

A. Well, all the discussions with Garth Guy were about the public offering. That's what they wanted to hire

me for, to assist them in getting that accomplished. That was an integral part of the financial plan for the farm.

Q. Was there any discussion at this visit as to projected price of the shares in the public offering?

A. No.

Q. Any discussion of the volume?

A. I don't recall any.

Q. Any discussion of the amount they wanted to raise in the public offering?

A. I think those numbers came out later. I don't really recall discussing that in the interim other than the fact they were thinking of a $20- or $30 million underwriting.

Q. Were you offered a board position at this meeting when you went back with your wife?

A. Yes. I think that was part of the package.

Q. You testified earlier that part of the reason for not wanting to be a full-time employee at Spendthrift was the fact you did not want to move back to Kentucky and you were content with what you were doing at Ardshiel. Is that accurate?

A. Yes.

Q. Did you express those concerns to Brownell and Garth at this meeting when you went back with your wife?

A. No. I think I was pretty much listening at

that point.

Q. "Pretty much listening"?

A. Listening to their proposition, yes.

Q. Did they continue to offer you more and more compensation if you joined Spendthrift?

A. No.

Q. Were you requesting more compensation if you were going to take on that responsibility?

A. No. I considered the package that they offered me fair in terms of compensation for that kind of job.

Q. Did you have any conversations with Mr. McGuinness about going back to Spendthrift the second time with your wife?

A. Probably did. I don't recall anything specific.

Q. Did Mr. McGuinness continue to encourage you to take the position at Spendthrift?

A. Yes.

Q. Was he upset with your reluctance not to?

A. No. I don't recall him being upset.

Q. You went back a second time with your wife. Was there any discussion at this meeting or visit about Bateman Eichler being the underwriter on the public offering?

* * *